IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 4TH JUNE 2007 / 14TH JYAISHTA 1929

SA.No. 427 of 1993(A)

OS.308/1984 of PRL.MUNSIFF, KASARAGOD
AS.85/1990 of SUB COURT, KASARAGOD
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2ND DEFENDANT/2ND RESPONDENT/APPELLANT:

KUNHANLIMA, D/O.ISMAIL,
MUSLIM, CULTIVATOR, RESIDING AT UCHILADKA OF BELLUR VILLAGE, KASARAGOD TALUK.

BY ADV. SRI.KODOTH SREEDHARAN

PLAINTIFFS/APPELLANTS/RESPONDENTS:
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1. **HASSAINAR, S/O.ISMAIL, MUSLIM, CULTIVATOR, RESIDING AT HOSAMANE OF BELLUR VILLAGE, KASARAGOD TALUK, P.O. BELLUR.**

2. **MOHAMMED, S/O.ISMAIL, MUSLIM, CULTIVATOR, RESIDING AT MADKKA OF BELLUR VILLAGE, KASARAGOD TALUK, P.O.BELLUR.**

3. **ASSYAMMA, D/O.ISMAIL, MUSLIM, CULTIVATOR, RESIDING IN ADKAR MAJULA OF BELLUR VILLAGAE, KASARAGOD TALUK, P.O. BELLUR.**

4. **M.ABDULLA, AGED 52 YEARS, S/O.ISMAIL, MUSLIM, CULTIVATOR, RESIDING AT MADAKKE OF BELLUR VILLAGE, KASARAGOD TALUK.**

BY ADV.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 04/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 427 OF 1993

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Dated this the 4th day of June, 2007

JUDGMENT

Second defendant in O.S.308/1984 on the file of Munsiff Court, Kasaragod is the appellant. Respondents 1 and 2 are the plaintiffs and the other defendants the other respondents. The suit was instituted seeking a decree for partition of the plaint schedule property having an extent of 53 cents in R.S.82/2B of Bellur Village of Kasaragod Taluk. The plaint schedule property admittedly originally belonged to Government and was granted in favour of Ismail on dharkasath. The first defendant was the wife of Ismail and Plaintiffs and defendants 2 to 4 are their children. Though Ismail had another daughter by name Pathumma, she pre-deceased Ismail. On the death of Ismail on 5.10.1973, his rights devolved on first defendant and her children the plaintiffs and defendants. Contending that plaint schedule property is in the

joint possession of the plaintiffs and defendants, suit was filed seeking partition and separation of the share of the plaintiffs. Though first defendant appeared, she did not file any written statement. She subsequently died during the pendency of the suit. Second respondent in the written statement contended that though Ismail obtained the property from Government, it did not devolve on the legal heirs and on Vishu 1955 Mohammad Beary, her husband obtained the property on oral chalageni lease agreeing to pay annual rent of Rs.2/- from Ismail and since then he has been in possession of the property and he constructed the house and effected improvements and has been residing with the second defendant, her children and after the death of Mohammad Beary the property has been in the possession of the wife and children and therefore it is not available for partition. It was contended that second respondent and her children are cultivating tenants entitled to the benefit of Kerala Land Reforms Act and suit is to

be referred to the Land Tribunal as provided under section 125(3) of Kerala Land Reforms Act. It was also contended that the suit is bad for partial partition as Ismail had other properties which are not included in the suit. Third respondent admitted the plaint allegations and sought her share. As is bound to, learned Munsiff referred the question of tenancy claimed by second respondent to the Land Tribunal under section 125 (3) of Kerala Land Reforms Act. Land Tribunal, Kasaragod in the reference proceedings on the evidence of the son of the second respondent and a witness on the side of defendants and Ext.A1 on the side of the plaintiffs and Exts.B1 to B35 on the side of defendants and Ext.C1 the report of the Revenue Inspector, upheld the claim of tenancy and found that the plaint schedule property belongs to second defendant and her children as cultivating tenants. On receipt of the findings, as is bound to, learned Munsiff accepted the finding and dismissed the suit holding that plaint schedule

property is not available for partition. Plaintiffs challenged the decree and judgment before Sub Court, Kasaragod in A.S.85/1990. Learned Sub Judge on reappreciation of evidence, set aside the findings of Land Tribunal and held that second respondent is not a cultivating tenant and the plaint schedule property is available for partition. A preliminary decree for partition was passed. It is challenged in the Second Appeal by the second defendant.

2. The Second Appeal was admitted formulating the following substantial questions of law.

1) When the definite plea and evidence of second defendant was that the rent payable is Rs.2/- and the landlord was not issuing receipts, was the Appellate Court correct in negativing the claim of lease on the ground that payment of sarkar tax will not amount to payment of consideration as provided under section 2(57) of Kerala Land Reforms Act.

2) When documents produced by appellant

establish continuous exclusive possession of the properties ever since the lease, by the lessee and when there is no evidence from the plaintiffs to prove possession at any point of time after lease, was the first Appellate Court correct in holding that second respondent is not a cultivating tenant?

3) Whether the first Appellate Court was correct in granting a preliminary decree in the light of the evidence on record?

3. Learned counsel appearing for appellant was heard. After the learned counsel, who filed Vakalath for respondents 1 and 2 expired, no fresh vakalath was filed and respondents 1 and 2 did not appear.

4. The arguments of learned counsel appearing for appellant was that the evidence establish that Ismail, father of the appellant, died only in 1974 and Mohammad Beary, husband of the appellant, died in 1973 and Exts.B1 to B35 the documents produced by appellant establish that it was Mohammad Beary who was paying tax for the building as well as the

property from 1962 onwards and in such circumstances, eventhough no rent receipt was produced, first Appellate Court should not have interfered with the findings of the Land Tribunal which was entered on the basis of the evidence. It was argued that when landlord was the father-in-law and the evidence establish that there was no habit of passing rent receipts, the failure to produce rent receipts was not fatal and first Appellate Court should not have set aside the finding of the Land Tribunal and found that plaint schedule property is available for partition. It was also argued that no evidence was adduced to prove that Ismail has been in possession of the property after 1955, when it was granted oral lease in favour of Mohammad Beary and the continous possession of Mohammad Beary and his wife and children would establish that the oral lease set up by the appellant is correct and in such circumstances the preliminary decree passed by the first Appellate Court should be set aside. It was further argued

that in any case appellant is entitled to get reservation of the house as it was proved that appellant and her husband and children have been residing in that house from 1962 onwards.

5. The plaint schedule property admittedly originally belonged to Government. It was granted on darkasath in favour of Ismail. If there was no oral lease as contended by the appellant, it cannot be disputed that the property is available for partition and it is to be divided in between the sharers, as has been done by the first Appellate Court in the preliminary decree. The question therefore is whether there was an oral lease of the plaint schedule property in favour of Mohammad Beary, the son-in-law by the father-in-law Ismail? What was contended in the written statement was that there was an oral lease on Vishu 1955 and the lessee has to pay annual rent of Rs.2/-. Though it was contended that since 1955 Mohammad Beary and his wife and children have been in possession of the property and paying rent, no

rent receipt was produced. The first Appellate Court has taken this an important aspect to negative the claim of oral lease. The argument of the learned counsel appearing for appellant was that when the landlord is the father-in-law and there was no habit of passing rent receipts, the failure to produce rent receipt is not fatal. The question is whether there is evidence to prove that Mohammad Beary paid rent, but Ismail either refused to issue receipt as deposed by the son of the appellant, or was not in the habit of issuing receipts at all. Even according to son of the appellant, he was only aged 5 years at the time of the lease. He cannot have any personal knowledge with regard to the oral lease. The alleged lease was set up by the father-in-law in favour of the son-in-law. When the alleged lessee Mohammad Beary is no more, the best person who could have spoken about the lease, if in fact there was an oral lease, was the appellant herself. For reasons best known to the appellant, she was not chosen to give

evidence. In such circumstances, when the best evidence was not adduced before the court, first Appellate Court was correct in holding that evidence of the son of the appellant does not establish that no rent receipt was passed by the landlord inspite of payment of rent. Eventhough the son of the appellant deposed that there was no habit of passing rent receipt, he has no case that he was present at any time when rent was allegedly paid by his father to the grandfather and grandfather either refused to issue receipt or stated that there is no necessity to issue receipt. In such circumstances, first Appellate Court was correct in holding that the case of habit of non-passing of rent receipt was not proved. The appellant did not adduce any evidence to prove the oral lease. When exactly the oral lease was granted and in whose presence it was granted not pleaded. No evidence was also adduced. In such circumstances, the finding of the first Appellate Court that appellant did not establish the oral

lease is correct.

6. It was vehemently argued by learned counsel appearing for appellant that production of Exts.B1 to B35 the building tax receipts etc. establish that Mohammad Beary has been residing therein and was paying the tax and it probabilise the case of oral lease. It is to be borne in mind that Mohammad Beary or appellant is not a stranger. When the son-in-law is paying tax for Ismail it could be that he obtained receipts in his name. The production of the tax receipts by themselves will not establish that there was an oral lease. First Appellate Court appreciated the entire evidence in the proper perspective. I do not find any reason to interfere with the finding of the first Appellate Court that appellant did not establish the oral lease in favour of Mohammad Beary. In such circumstances, the finding of the first Appellate Court that all the legal heirs of Ismail are entitled to a share in the plaint schedule property is perfectly correct.

7. There is force in the argument of the learned counsel appearing for appellant that in the light of the evidence, as it is proved that appellant and her husband and her children were residing in their house situated in the plaint schedule property for the last several years, they are entitled to get reservation of the house. First Appellate Court did not consider this aspect. While dividing the property in the final decree proceedings, trial court has to consider the question whether in equity the house in the plaint schedule property could be allotted to the share of the appellant.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.427 /1993

JUDGMENT

4TH , JUNE, 2007